Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH COYLE, WARDEN,

Petitioner

vs.

DAVID A. MAPES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME III

BETTY D. MONTGOMERY
Attorney General of Ohio
STUART A. COLE*
Assistant Attorney General
**Counsel of Record*
JONATHAN R. FULKERSON
MATTHEW J. LAMPKE
Assistant Attorneys General
30 E. Broad Street, 26th Floor
Columbus, Ohio 43215-3428
(614) 728-7055
COUNSEL FOR PETITIONER

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Filed: January Term, 1985

The State of Ohio, Appellee, v. Mapes, Appellant

[Cite as State v. Mapes (1985), 19 Ohio St. 3d 108.]

Criminal law – Aggravated murder – Death penalty upheld, when.

Syllabus by the Court.

1. Crim. R. 11(B)(2) and Evid. R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. 2929.04(A)(5).

2. A finding by a jury that an accused "unlawfully and purposefully caused the death" of another is sufficient to withstand challenge under *Enmund v. Florida* (1982), 458 U.S. 782, because R. C. 2903.01(D) requires a finding that the accused intentionally caused the death of another for a conviction of aggravated murder.

3. The determination of whether a voir dire in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial judge.

(No. 84-1885 – Decided August 9, 1985)

APPEAL from the Court of Appeals for Cuyahoga County.

On January 30, 1983 at approximately 7:50 a.m., appellant, David Mapes, and Rodney Newton entered Chap's Bar located on Prospect Avenue in Cleveland, Ohio. The bar was closed, but one of its owners, John Allen, and four

employees were present. Allen, Ronald Rucci and Michael Williams were seated at the bar. John Hovekamp and David Yun were off to the side in a section of the bar known as the "pit area," asleep. A sixth man, Frank Kuhn, was upstairs in the building.

Mapes and Newton gained entrance through the rear of the building and, upon encountering the three men at the bar, Mapes aimed a sawed-off shotgun he was carrying at Rucci's head and instructed all three to put their hands on the bar. Allen began to make some gesture with his hands and Mapes shot him in the face. Allen fell to the floor, mortally wounded. At the sound of the shot, Rucci dove to the floor. Mapes ordered Williams to lie on the floor and then searched the men on the floor, including Allen, for money. Newton went first behind the bar to the cash register, and then proceeded to the video machines. While en route to the video machines, Newton spotted Yun and Hovekamp in the "pit area" and notified Mapes of their presence. Mapes ordered Rucci and Williams to crawl to the "pit area" and stood guard over the four there while Newton broke into the video games with a crowbar.

Mapes and Newton next proceeded to the back of the building where the safe was located and the liquor was stored. The two were not able to open the safe as Allen had been the only one present who knew the combination. The four men then heard a door slam and, after determining it was safe, called the police. Allen was dead when the police arrived at 8:10 a.m. The police found no one at the scene but found a broken window by the parking lot of the Town House Apartments and a garage door held open by a wooden block.

Michael Reese, upon hearing the news accounts of the murder and robbery, notified a Cleveland detective that Mapes had approached him and had attempted to recruit him

for the robbery of Chap's Bar. Reese gave the police a formal written statement to this effect on February 5, 1983. On February 6, the police showed a photo array to John Hovekamp. He selected photos of three individuals whom he thought resembled the gunman. This group included a photo of appellant. On the next day, a warrant for appellant's arrest and a warrant to search his apartment were obtained. This search, conducted on February 8, 1983, revealed, among other things, a crowbar. Appellant was arrested and, when questioned, he told police that he had merely prepared an entrance to the bar, but that Newton and a man named Red had committed the robbery. On February 11, 1983, a lineup was held at which Hovekamp positively identified appellant as the man carrying the shotgun within the premises where the robbery and murder occurred.

Newton was arrested on March 4, 1983 in Akron and was interviewed by Cleveland police on March 7. He gave a full written statement to the police recounting the events at the bar consistent with the accounts of the bar employees and the police investigation. This written statement was introduced at trial and Newton testified at trial. Newton also indicated that appellant had returned to his own apartment and dropped unused shells down a drainpipe and arranged to dispose of the gun. After obtaining a warrant, the police found a shell in the hole indicated by Newton. The shell was the same type that was used to kill Allen.

Rucci positively identified appellant during the trial as the man who shot Allen with the sawed-off shotgun. Hayward Chambers testified at trial that appellant had admitted to him that he had robbed Chaps and killed Allen. Appellant's wife and a neighbor, Christine Alexander, both testified that appellant owned a sawed-off shotgun.

Appellant was indicted for two counts of aggravated murder under R.C. 2903.01(B). One count charged that the

murder occurred during the course of an aggravated robbery. The other count charged that the murder occurred during the course of an aggravated burglary. Each of these counts had four identical specifications as follows: Under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated robbery; under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated burglary; under R.C. 2929.04(A)(5), one death-penalty specification alleging a prior murder conviction; and, under R.C. 2941.141, one firearm specification. In addition to the death-penalty charges, Counts Three, Four and Five each charged aggravated robbery under R.C. 2911.01, and Count Six charged aggravated burglary under R.C. 2911.11.

The jury returned a verdict finding appellant guilty of both counts of aggravated murder under R.C. 2903.01(B), but not guilty of the death-penalty specifications charged under R.C. 2929.04(A)(7). Appellant was found guilty of the firearm specification as well as Counts Four, Five and Six. Appellant was found not guilty of Count Three.

The issue of whether appellant was guilty of the prior murder specification under R.C. 2929.04(A)(5) was tried separately to the court. The court received into evidence an indictment from Passaic County, New Jersey, charging appellant with murder. Also, received was a judgment of conviction entered upon appellant's plea of *non vult*. The court found appellant guilty of the prior murder specification under R.C. 2929.04(A)(5).

At the sentencing phase of trial, appellant made a statement on his own behalf, but presented no other witnesses. The jury returned a recommendation that the death penalty be imposed. The trial court sentenced appellant to death on the two counts of aggravated murder

and to terms of imprisonment on Counts Four, Five and Six, to run consecutively.

The court of appeals merged the conviction for aggravated murder with specifications under Count Two of the indictment with the conviction under Count One because only one homicide occurred. The court of appeals affirmed the judgment of conviction and the various sentences imposed by the trial court.

This cause in now before the court upon an appeal as of right.

John T. Corrigan, prosecuting attorney, and *Timothy J. McGinty*, for appellee.

Paul F. Markstrom and *Daniel Gaul*, for appellant.

WRIGHT, J.

I

In his first proposition of law, appellant argues that the *non vult* plea is equivalent to a no contest plea and, under Crim. R. 11(B)(2) and Evid. R. 410, the New Jersey conviction entered upon a *non vult* pleas is inadmissible to prove a prior murder specification under R.C. 2929.04(A)(5). Crim. R. 11 states in part:

> "(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:
>
> "* * *
>
> "(2) The pleas of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment,

information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

Evid. R. 410 states in part:

"Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn or a plea of no contest, or the equivalent pleas from another jurisdiction, * * * is not admissible in any civil or criminal proceeding against the person who made the plea or offer. * * *"

R.C. 2929.04 provides, in part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment * * * and proved beyond a reasonable doubt:

"* * *

"(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, * * *."

[1] Appellant was convicted of murder by a New Jersey court. An essential element of this crime was the purposeful killing of another. Two investigating officers from New Jersey testified at a proceeding conducted by the trial judge that appellant was convicted of the prior murder. Under New Jersey law, appellant's *non vult* plea to the murder indictment had the effect of insuring that appellant would not receive the death penalty. This *non vult* plea was made pursuant to a statute, the purpose of which was "the humane end that a guilty defendant need not run the gauntlet of a trial on capital

punishment. ***." *State v. Forcella* (1968), 52 N.J. 263, 279, 245 A.2d 181, 189. Thus we find that the admission of the prior conviction did not violate Crim. R. 11(B)(2) or Evid. R. 410.

Crim. R. 11(B)(2) or Evid. R. 410 prohibit only the admission of a no contest plea. These rules do not prohibit the admission or a conviction entered upon that pleas when such conviction is made relevant by statute. The trial court was correct in admitting the evidence of the prior conviction as it was not equivalent to the admission of the no contest plea and it was not introduced by the prosecution for any purpose other than establishing the specification. The purpose of Evid. R. 410 as it relates to trials is to encourage and protect certain statements made in connection with plea bargaining and to protect the traditional characteristic of the no contest plea which is avoiding the admission of guilt that is inherent in pleas of guilty. See 1 Weissenberger, Ohio Evidence (1985) 55, Section 410.1 and Advisory Committee Notes to Fed. R. Evid. 410. These purposes are not disserved by the admission of a conviction entered upon a no contest plea.

The issue of the applicability of Evid. R. 410 and Crim. R. 11(B)(2) aside, we note that the United States Supreme Court has authorized admission of prior convictions and pleas of no contest in death penalty cases, *Gregg v. Georgia* (1976), 428 U.S. 153,[1] and the majority rule that convictions

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[1] The court in *Gregg v. Georgia* examined the Georgia death penalty statutes. Georgia Code Ann. Section 27-2503 (Supp. 1975), as quoted in that case provides, in part: "'[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, * * *." The court

entered on pleas of no contest are admissible to establish enhanced penalties. See Annotation (1963), 89 A.L.R. 2d 540, 610. Thus, we hold that Crim. R. 11(B)(2) and Evid. R. 410 do not preclude admission of a conviction entered upon a no contest plea to prove a prior murder specification under R.C. 2929.04(A)(5). Accordingly, this argument is without merit.

II

Appellant argues in his second proposition of law that the jury's verdict finding him guilty of the charges of aggravated murder during the course of a burglary and robbery in Counts One and Two but not guilty of the specifications based on the same conduct under each count was inconsistent and requires reversal.

The two aggravated-murder counts read as follows:

> Count One: "[T]he above named Defendant(s) *** unlawfully and purposefully caused the death of another, to-wit: John Allen, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit an Aggravated Robbery."
>
> Count Two: "[T]he above named Defendant(s) *** unlawfully and purposely caused the death of another, to-wit: John Allen, while committing or attempting to commit or while fleeing immediately after committing or attempting to commit an Aggravated Burglary."

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held that the Georgia death penalty statues were constitutional.

On each count of aggravated murder, appellant was found not guilty of these two specifications:

> "The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and either the offender was the principal offender in the commission of the Aggravated Murder, or if not the principal offender, committed the Aggravated Murder with prior calculation and design and/or
>
> "The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary, and either the offender was the principal offender in the commission of the Aggravated Murder, or if not the principal offender, committed the Aggravated Murder with prior calculation and design; * * *."

Appellant argues that the verdicts are inconsistent because they seem to say appellant purposefully caused the death of John Allen during the course of an aggravated robbery and an aggravated burglary while at the same time saying he was not guilty of such offenses.

Initially, we note that the finding of guilt on the third specification involving a prior conviction is sufficient to warrant the death penalty regardless of the findings on specifications one and two. Additionally, we note that a close reading of the language in the principal charge and the two specifications reveals that there is not necessarily an inconsistency in the guilty verdict of aggravated murder under R.C. 2903.01(B) and the jury's finding of not guilty on

the two specifications. An individual can be convicted of aggravated felony murder as an accomplice absent a finding that either the individual was the "principal offender" or that he committed the murder with "prior calculation and design" as those terms were used in the first two specifications. Thus, a person would be guilty of murder but would not be guilty of the aggravating specification set out in R.C. 2929.04(A)(7). Therefore, appellant's argument that there is an inherent inconsistency in the results reached by the jury must be rejected. We would also point out that this issue is also resolved by our decision in *State v. Perryman* (1976), 49 Ohio St. 2d 14 [3 O.O.3d 8], vacated on other grounds (1978), 438 U.S. 911.

State v. Perryman presents precisely the situation in the instant case. In *Perryman*, the jury found the accused guilty of aggravated murder and aggravated robbery, but found the accused not guilty of a specification involving aggravated robbery. The court held in paragraph three of the syllabus that:

> "Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid."

In explaining its result, the court in *Perryman* stated at 26:

> "* * * The sentence was not based on an alleged inconsistency. The guilty verdict for count one reflects the jury's determination that appellant was guilty of the felony-murder. The determinations rendered as to the respective specifications can not change that finding of guilty. Furthermore, as

> indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder in not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge. If more than one specification is charged, a finding of guilty on only one such specification is all that is required in order for the court to render the death sentence."

We hold that the guilty verdicts on the two counts of aggravated murder are not rendered invalid by the jury's finding of not guilty on the two specifications.[2]

III

In his third proposition of law appellant argues that the United States Supreme Court mandate in *Enmund v. Florida* (1982), 458 U.S. 782, is violated when a verdict is returned without an indication of whether or not an accused is found guilty as an aider and abettor when the jury has been instructed on aider-and-abettor principles and that the permitted use of such a procedure renders the Ohio death penalty statutes unconstitutional.

In *Enmund v. Florida* the court found that the evidence supported no more than an inference that the petitioner in that case was the driver of a car that was used to escape a robbery

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[2] Appellant's argument that the trial court committed error by instructing the jury that, in deciding the second issue of each specification, it must decide whether appellant "purposefully" committed aggravated murder is likewise rejected. R.C. 2903.01 provides that purposefulness is an element of aggravated murder. Therefore, the charge was not incorrect.

that involved two or murders. Thus, the petitioner clearly did not kill the victim, was not carrying a gun, and was not even present at the murders. The Supreme Court stated that an accused's culpability must be examined individually and that the death penalty may not be imposed on one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* At 797. More specifically, the court variously described this evaluation of an accused's culpability as an examination of his "intentions, expectations, and actions," *id.* at 800, "of whether * * * [he] intended or contemplated that life would be taken," *id.* at 801, and whether he had an "intention or purpose that life will be taken. [*Id.* at 799]" The court's reasoning was that the two social purposes of the death penalty – retribution and deterrence of capital crimes – will not be served if one is sentenced to death whose culpability does not meet the above standard.

Appellant's culpability meets the standard enunciated in *Enmund.* Unlike *Enmund,* the evidence viewed most favorably to appellant places him at the killing with gun in hand and all the evidence presented supports a finding that appellant was the triggerman. Further, unlike *Enmund,* the jury in the instant case found that appellant "unlawfully and purposely caused the death" of Allen. The jury's finding that appellant "unlawfully and purposely caused the death" of Allen satisfies *Enmund v. Florida* because that degree of culpability falls squarely within the standards quoted above. Therefore, the evidence and the jury's verdict are sufficient to withstand the *Enmund* test.

Appellant's argument that Ohio's death penalty statute does not satisfy *Enmund* also lacks merit. R.C. 2903.01(D) provides that, "[n]o person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. * * *" Thus, an accused cannot be found guilty of aggravated murder unless he is found to

have intentionally caused the death of another. This intent standard falls squarely within the requirements of *Enmund*. Therefore, the Ohio death penalty statutes satisfy *Enmund v. Florida* because, for a conviction of aggravated murder, R.C. 2903.01 (D) requires a finding that the accused intentionally caused the death of another.

IV

In his fourth proposition of law, appellant urges this court to adopt a rule requiring the "death-qualification" of jurors independent and separate from one another. Appellant argues that examining the jurors while gathered as a group tends to predispose the jurors as to the accused's guilt and condition the jurors towards rendering the death penalty.

Independent questioning is not required by Ohio's death penalty statutes, and the United States Supreme Court has not ruled that it is required by the United States Constitution. In fact, many other jurisdictions have held that questioning prospective jurors while gathered as a group is permissible in capital cases. *See*, e.g., *State v. Kirkpatrick* (La. 1983), 443 So. 2d 546; *Lexington Herald-Leader Co., Inc. v. Meigs* (Ky. 1983), 660 S.W. 2d 658; *Irvin v. State* (Okla. Crim. App. 1980), 617 P. 2d 588. The determination of whether a *voir dire* in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial judge. *State v. Gall* (1980), 65 Ohio App. 2d 57. The trial court's determination will not be reversed absent a showing of abuse of discretion. See *State v. Kirkpatrick*, *supra*. See, also, *Rosales-Lopez v. United States* (1981), 451 U.S. 182; *United States v. Gerald* (C.A. 5, 1980), 624 F. 2d 1291, *rehearing denied* (1980), 629 F. 2d 1350, certiorari denied (1981), 450 U.S. 920. Appellant has demonstrated no abuse of discretion or prejudice. Accordingly, this proposition of law is rejected.

V.

In his fifth proposition of law, appellant argues that he was denied his Fifth Amendment right to remain silent by the prosecutor's comment that appellant's statement during the sentencing phase was not made under oath.

Appellant did not testify during the guilt phase of trial, but gave an unsworn statement during the sentencing phase. Pursuant to R.C. 2929.03(D)(1), the prosecutor was not permitted to cross-examine on the unsworn statement. During the prosecutor's final argument, the following comments were made:

"You are supposed to look at the evidence hard, coldly, and say, is there mitigation, and does the defendant, he had the burden of going forward, he said to you, I chose not to take the oath.

"By his taking the stand like he did, and by him not taking an oath, this is what he is telling you. Number one, I am not going to subject myself to any response whatsoever. From that testimony –

"MR. CARLIN: Objection, your Honor.

"THE COURT: Overruled.

"MR. NUGENT: It means nothing.

"He says to you that he chooses not to be the same as you and take the oath that you took and every other witness took. He is the only person that came before you out of over 30 witnesses that didn't take the oath.

"And what should that mean to you? It should show you the kind of person that he is, that he doesn't want someone to

question him about, well, if you say that you weren't the trigger man, let's get a little information about that. Let the prosecutor ask you a couple of questions."

Appellant argues that these comments violated his right to remain silent. Comments similar to these were held permissible in *State v. Jenkins* (1984), 15 Ohio St. 3d 164. In *State v. Jenkins*, this court stated at 217 that the prohibition of *Griffin v. California* (1965), 380 U.S. 609, against prosecutorial comment on a defendant's failure to testify does not extend to an unsworn statement during the sentencing phase. If a defendant chooses to make an unsworn oral statement to the jury, the prosecution should be allowed to argue that the defendant's statement has less credibility because it is not given under oath. The jury must determine the weight attributed to the evidence presented, including defendant's unsworn oral statement. Therefore, the state should be able to dispute the weight of that statement without violating defendant's Fifth Amendment rights. This proposition of law is rejected.

VI

In his final proposition of law, appellant argues that the provisions of R.C. 2929.03(C)(2)(b) that require the same jury at the guilt and sentencing phases violate the impartial jury, effective assistance of counsel, equal protection and due process provisions of the Ohio and United States Constitutions.

R.C. 2945.25(C) permits challenge for cause in a capital case if a venireman "unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case." This statute finds its origin in *Witherspoon v. Illinois* (1968), 391 U.S. 510, wherein the Supreme Court stated that prospective jurors may be excluded for cause

when it is unmistakably clear that they will automatically vote against the death penalty without regard to the evidence or that their attitudes toward the death penalty will prevent them from making an impartial decision. Appellant argues that the process of "death-qualifying" jurors that sit for the guilt phase of a capital trial violates the rights of equal protection and due process because such jurors are not representative of a fair cross-section of the community and are conviction prone.

This argument was addressed in *State v. Jenkins, supra*, in which we noted that the United States Supreme Court has never required separate juries for the guilt and penalty phases of a capital trial.[3] In *Jenkins*, this court relied on *Keeton v. Garrison* (C.A. 4, 1984), 742 F. 2d 129[4]; *Adams v. Texas* (1980), 448 U.S. 38[5]; and *Smith v. Balkcom* (C.A. 5, 1981), 660 F. 2d 573, *certiorari denied* (1982), 459 U.S. 882, in

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[3] The Supreme Court in *Witherspoon v. Illinois* (1968), 391 U.S. 510, at 517-518, stated: "* * * We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was."

[4] Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case." *Keeten, supra*, at 133.

[5] "The State may insist, however, that jurors will consider and decide the facts impartial and conscientiously apply the law as charged by the court." *Adams* at 45.

holding at 188 that "death-qualify[ing] a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury." This holding controls this issue as raised in this case.

Appellant also argues that the use of the same jury at the guilt and penalty phases of his trial violated his right to trial by a fair and impartial jury and his right of effective assistance of counsel. Appellant argues that the jury did not fairly and impartially view him during the penalty phase because it had convicted him during the guilt phase and that appellant's counsel was not effective during the penalty phase for the same reason. These arguments were also rejected in *State v. Jenkins* where we stated: "Appellant also submits that since the same jury which convicted him also sentenced him, he was denied a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Sections 10 and 16, Article I of the Ohio Constitution. Appellant illustrates this contention by arguing that if defense counsel pursues a defense at the guilt phase of a capital trial which affects defendant's credibility, then his credibility is diminished at the sentencing state. Suffice it to say that although the Supreme Court has endorsed bifurcated proceedings in death penalty cases, see *Zant v. Stephens*, * * * [(1983), 462 U.S.____, 77 L. Ed. 2d 235] at 248, the court has yet to even remotely suggest that the Constitution requires a new jury be selected for the sentencing phase. Accordingly, we are unable to accept appellant's contention." *Id.* At 173-174, fn. 11.

This proposition of law is rejected.

VII

We now undertake the task of independently weighing the aggravating circumstances surrounding the murder of John Allen against the factors appellant has presented which mitigate against the imposition of the death penalty. R.C. 2929.05(A) mandates this weighing process and states in pertinent part:

> "* * * [T]he supreme court shall * * * review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors of the case * * *."

R.C. 2929.05(A) provides further:

> "* * * [T]he supreme court shall affirm a sentence of death only if the * * * court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case * * *."

In the instant case, appellant was found guilty of the aggravating circumstance of willfully killing one John Clark in New Jersey in 1972.[6] During the sentencing phase of the trial, appellant offered an unsworn oral statement claiming that he was not the triggerman in that prior New Jersey murder. He also testified that he had offered to plead guilty before trial in the instant case in exchange for life imprisonment without parole. Triggerman or not, the court in the previous case found that appellant "willfully,

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[6] Appellant received a sentence of eight to ten years' imprisonment for this conviction.

feloniously and * * * [with] malice of aforethought" murdered John Clark. Thus, that conviction satisfies R.C. 2929.04(A)(5). We place little weight on appellant's offer to plead guilty in the instant case. There is no provision in Ohio law for life imprisonment without possibility of parole. Thus, assuming appellant's offer was accepted – a guilty pleas in exchange for a possibility of parole – appellant would eventually be eligible for parole. Further, appellant's offer to plead guilty in no way excuses his culpability in two murders. After careful consideration of these mitigating factors at the time the life of John Allen was taken, we can come to but one conclusion: the mitigating factors do not outweigh the aggravating circumstances.

VIII

Our final determination must be whether the death sentence is appropriate in this case. R.C. 2929.05(A) provides in pertinent part:

> "* * *[T]he supreme court * * * determine * * * whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the * * * supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. * * *"

R.C. 2929.05(A) continues:

> "* * * [T]he supreme court shall affirm a sentence of death only if * * * [it] is persuaded from the record * * * that the sentence of death is the appropriate sentence in the case."

Appellant has been twice convicted of purposely causing the death of another. Capital punishment in this case can not be viewed as excessive when compared to its imposition in

State v. Jenkins, supra, for murder coupled with armed robbery, or in *State v. Maurer* (1984), 15 Ohio St. 3d 239, for murder coupled with kidnapping, or with *State v. Rogers* (1985), 17 Ohio St. 3d 174, for kidnapping, rape and murder. A review of these cases and the other cases in Ohio where the death penalty has been imposed has led the court to the conclusion that a sentence of capital punishment in the instant case is neither excessive nor disproportionate to the penalties imposed in similar cases. Therefore, we affirm the finding of the court of appeals that the death sentence is appropriate in the case.

IX

In conclusion, we first find that there is no merit to any of the specific issues raised by appellant concerning the proceedings below. Second, we find that the aggravating circumstances of a prior conviction of purposeful killing outweighs any and all of the mitigating factors presented by appellant. Third, we find the sentence of death to be appropriate in this case, as it is neither excessive nor disproportionate to the penalty imposed in similar cases. Thus, in accordance with R.C. 2929.05(A), we affirm the conviction and sentence of death in this case.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

DAHLING, LOCHER, HOLMES, CLIFFORD F. BROWN and DOUGLAS, JJ., concur.

CELEBREZZE, C.J., concurs and concurs separately.

DAHLING, J., of the Eleventh Appellate District, sitting for SWEENEY, J.

CELEBREZZE, C. J., concurring. I join my brethren in affirming both the conviction and sentence in this cause. However, I fear that Part V of the majority opinion could be misread to imply that an accused waives his Fifth Amendment[7] protection against self-incrimination by electing to exercise his statutory option of making an unsworn statement to the jury during the penalty phase of a capital proceeding.

"In *Griffin v. California* (1965), 380 U.S. 609, [32 O.O.2d 437], the Supreme Court ruled as prejudicial direct comments upon the accused's failure to take the stand. In so holding, the court recognized that to allow such comments would penalize an accused for exercising his constitutional right against self-incrimination." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 162.

Similarly, paragraph one of the syllabus in *State v. Lynn* (1966), 5 Ohio St. 2d 106, [34 O.O. 2d 226], provides:

> "Comment by the trial court or by the prosecutor upon the failure of an accused to testify in a criminal proceeding against him violates the self-incrimination clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment. (United States Supreme Court in *Griffin v. California*, 14 L. Ed. 2d 106.)" See, also, *Lockett v. Ohio* (1978), 438 U.S. 586 [9 O.O. 3d 26]; *Johnson v. United States* (1943), 318 U.S. 189.

The Fifth Amendment protection affording an accused the right to remain silent extends to every "criminal proceeding." *Lynn, supra.* This safeguard undoubtedly

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[7] See the Fifth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution.

embraces the penalty phase of capital cases where defendants compete with the prosecutors for their very lives.

In exercise of his Fifth Amendment right to remain silent, appellant chose not to testify during either the guilt or penalty phases of his capital trial. However, appellant exercised his statutory right[8] to make an unsworn statement to the jury during the sentencing phase only.[9]

Pursuant to the express terms of the statute the prosecutor was forbidden to question appellant. The trial court properly advised the jury of appellant's rights in this respect and explained that the state was statutorily precluded from cross-examination.

In this regard it must be recognized that rather than modifying or creating an exception to the constitutional prohibition announced in *Griffin*, the Ohio Legislature merely provided a means whereby an accused could decide to make an unsworn statement in mitigation, not subject to cross-examination, without waiving his constitutional

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[8] R.C. 2929.03(D)(1) provides in pertinent part: " * * * The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation."

[9] One primary purpose of the unsworn statement is to allow the defendant the opportunity to present a personal account so that the jury may better determine if the aggravating evidence of the case is in any way mitigated when viewed through the subjective eyes of the capital defendant. The weight and credibility to be assigned such unsworn remarks are, of course, matters for the jury to determine.

protection against self-incrimination and without incurring risk of a prosecutor arguing that his election to make such a statement is somehow evidence of guilt.

The applicability of our holding in *Lynn* to such remarks made during a capital sentencing hearing was recently considered in *State v. Jenkins* (1984), 15 Ohio St. 3d 164. During closing argument of the penalty phase of Jenkins' trial, the prosecutor stated:

"Let me make a note of something else while I talk about that statement [of Jenkins]. You notice, ladies and gentlemen, that throughout this trial, this part, as well as the previous part, their witnesses came in and the witness took the oath--."

At this point, "[t]he defense promptly objected and the objection was sustained. A contemporaneous motion for mistrial was denied. The court warned the prosecutor to abandon the argument and then instructed the jury to disregard the prosecutor's comments." *Id.* at 216.

On appeal Jenkins similarly claimed that the prosecutor's comment constituted a constitutional violation of the rule set forth in *Griffin v. California, supra*, as expressly recognized by this court in *State v. Lynn, supra*. This court rejected Jenkins' contentions by concluding that the prosecutor's utterances did not constitute prejudicial reversible error because the cases relied on were inapposite.

The distinction we made between *Jenkins* and the earlier cases was based on the content of the statements within the circumstances presented. Neither our decision in *Jenkins* nor our holding in the case *sub judice* should be read as establishing a broad rule that the Fifth Amendment is inapplicable once an accused chooses to address the jury in the sentencing phase. Simply put, *Jenkins* does not create a

per se blanket exception whereby a prosecutor has unlimited privilege to comment unfavorably on a capital defendant's choice to exercise a constitutional right. To the contrary, the purpose and protection of *Griffin* and *Lynn* are just as vital, if not more so, during the sentencing portion of a capital trial because a life is at stake. "Whether guilty or not, a defendant is entitled, as is every person charged with crime, to a fair trial." *State v. Petro* (1947), 148 Ohio St. 473, [36 O.O. 152], paragraph twelve of the syllabus.

In considering errors based on isolated remarks or testimony, a reviewing court must view the claim against the entire record. The Supreme Court of the United States has reminded us that:

> "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Johnson v. United States* (1943), 318 U.S. 189, 202 (Frankfurter, J., concurring).

As noted previously, central to our conclusion in *Jenkins* was a full consideration of the circumstances. The determination of whether prosecutorial remarks violate constitutional rights requires more than a mere color-matching of cases. It requires a careful evaluation of all the circumstances surrounding the statements. Cf. *Jenkins, supra*, at 232.

Such an evaluation reveals that in this case, as in Jenkins, the accused " * * * did not choose to remain silent. He exercised his option to speak." *Id.* at 216. Additionally, the prosecutor's comments concerning

appellant's credibility " * * * said nothing more than what the jury already knew to be true, namely, that all other *** witnesses testified under oath and that appellant did not." *Id.* at 217. The instant record also reflects that while the prosecutor did not cross-examine appellant, the defense was granted great leeway in the presentation of evidence: the court permitted defense counsel to develop appellant's unsworn statement by questioning his client before the jury.

Lastly, the court correctly instructed the jury on several occasions relative to the accused's statutory right to make an unsworn statement. The court also instructed the jurors that counsels' arguments did not constitute evidence. The court's charge following closing arguments advised the jurors that they should consider all proper evidence including the unsworn statement of the appellant. In fact, during the course of their deliberations, the jurors requested and were read appellant's entire unsworn mitigation statement without comment, to weigh and consider.

This is undeniably a close question presented in the midst of a death penalty review which is always the most difficult of all appellate tasks. In a slightly different setting, offending remarks similar to those made in this proceeding could result in a
different resolution.

However, under *these circumstances*, " *** the prosecutor's remarks, when reviewed in context, cannot be said to undermine the fairness of the trial and contribute to a miscarriage of justice." *United States v. Young* (1985), 470 U.S____, 84 L.Ed.2d 1, 15. Accordingly, I concur with today's rejection of appellant's contention.

APPENDIX F

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
NO. 47191

STATE OF OHIO, Plaintiff-Appellee	:	
v.	:	JOURNAL ENTRY
DAVID MAPES, Defendant-Appellant.	:	AND OPINION

DATE OF ANNOUNCEMENT OF DECISION: OCT 25 1984

CHARACTER OF PROCEEDING: Criminal Appeal From Common Pleas Court Case No. CR-181.703

JUDGMENT: Modified and affirmed as modified

DATE OF JOURNALIZATION: NOV 5, 1984

APPEARANCES:

For Plaintiff-Appellee: John T. Corrigan, Prosecuting Attorney of Cuyahoga County
Justice Center – Court Tower
1200 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellant: Paul F. Markstrom, Esq.
Ohio Savings Building, #208
22255 Center Ridge Road
Rocky River, Ohio 44116

Daniel Gaul, Esq.
517 Leader Building
Cleveland, Ohio 44114

PARRINO, P.J.:

Defendant, David Mapes, was found guilty by a jury of two counts of aggravated murder (R.C. §2903.01(B)). They also found defendant guilty of a specification under each count of aggravated murder for having a firearm on or about his person during the commission of the aggravated murder (R.C. 2929.71). Finally, the jury found defendant guilty of two counts of aggravated robbery (R.C. 2911.01) and one count of aggravated burglary (R.C. 2911.11). He was found not guilty of aggravating specifications one and two of aggravated robbery and aggravated burglary under each count of aggravated murder (R.C. 2929.04(A)(7)).

In a separate hearing conducted pursuant to R.C. 2929.022, the trial judge determined that defendant was guilty of the aggravating specification to the two counts of aggravated murder for violation of R.C. 2929.04(A)(5) which provides:

> "**Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another**, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." (Emphasis added.)

The jury recommended the death penalty after the subsequent sentencing hearing for the two counts of aggravated murder. The jury concluded that the aggravating circumstance outweighed any mitigating factors. The trial court independently determined that: "All of the alleged mitigating factors presented mostly by argumentation of counsel bear no weight whatsoever when compared to the single aggravating circumstance, that is, the purposeful prior killing in which the defendant willfully, feloniously and with

malice aforethought did kill and murder John Clark." *See* Opinion of the Trial Judge in Capital Case, p. 5. The court sentenced defendant to death for the two counts of aggravated murder and to imprisonment for the other convictions.

We conclude that the two convictions for aggravated murder must merge. In all other respects, we affirm the convictions and sentences imposed by the trial court.

On Sunday January 30, 1983, between 7 and 8 a.m., John Allen was shot and killed during the course of an aggravated robbery at Chaps Bar (Chaps or bar) at 2408 Prospect Avenue in Cleveland. Defendant and Rodney Newton entered the bar through a broken window in the back of the building and walked to the bar where they heard voices. Mapes was carrying a sawed-off shotgun.

Several men were in the bar when Mapes and Newton entered. John Allen, the decedent and one of the owners of the bar, was standing at the bar talking to Ronald Rucci and Michael Williams. John Hovekamp, Jr. who lived at Chaps, was asleep in the pit area of the bar along with David Yun.

Mapes walked into the bar first and told the men that this was a robbery. Newton was standing directly behind defendant. Allen started to lift his hands and Mapes fired the shotgun. The decedent was shot in the face and died instantly.

Newton checked the registers behind the bar for money, but he did not find any as it had been previously placed in the vault for safekeeping. Mapes had Rucci and Williams lie on their stomachs and asked them where the money was. They told him that it was in the storage room. Money was taken out of Rucci's and Williams' pockets.

Until that point the defendant and Newton were unaware that Hovekamp and Yun were down in the pit area. Newton finally saw the two men and told Mapes. Mapes guarded the four men while Newton broke into the video game machines with a crowbar. Mapes eventually gave Newton the shotgun so that defendant could finish emptying the coins out of the machines. After the last of the machines was emptied, Mapes took the shotgun back, and they left the same way they entered. On the way out, Mapes attempted to open the safe but he was unsuccessful.

Mapes was arrested for the murder of John Allen on February 8, 1983 at his apartment.

At trial Ronald Rucci testified that he observed the defendant enter Chaps on the Saturday night prior to the murder as a customer. He further stated that he and his partner, Michael Williams, had moved into the bar three days prior to the murder for the purpose of doing promotional work for Chaps. According to Rucci, the bar had closed at approximately 4 a.m. Sunday morning. Williams, Rucci and Allen were discussing plans for a Valentine's Day project when Mapes and Newton entered. While Rucci did not see the face of the man who carried the gun and killed Allen, he did testify the man had on a black leather coat.

At trial Newton testified for the state. He stated that he had been staying with Mapes and his wife, "Peaches" at their basement apartment in the Towne House Apartments about a week before the incident at Chaps. These apartments are located next door to Chaps. Mapes approached Newton about robbing Chaps two days before the incident, but Newton was opposed to the idea. Mapes again told Newton that he wanted to rob Chaps on the evening of January 29, 1983. He told Newton that he had already been inside, and he had seen power tools and mirrors that they could steal. At 2 a.m. on January 30, Mapes awakened Newton so they

could break into the bar. After observing numerous people in the vicinity, they decided to return later. Newton stated that he and Mapes went back to the bar later that same morning. Newton testified that Mapes was the one who killed John Allen. He also said that Mapes was wearing a bluish-black leather jacket the morning of the murder.

The testimony of Newton further established that when the two men returned to their apartment, Mapes placed some shotgun shells into a sewer drain by the front door and stuffed the drain with newspaper. Mapes also washed his wrists with a grapefruit and asked his wife to wash his clothes. Newton stated that Mapes took the shotgun to the home of a sister of another Towne House Apartment resident, Leon Jenkins. Newton testified that Leon Jenkins took him to Twinsburg that same day. Newton was arrested in Akron on March 4, 1983. He gave a written statement to police shortly after his arrest.

John Hovekamp, Jr. testified that he was living and working as a carpenter at Chaps on January 30, 1983. He was asleep in the pit area of the bar when he heard a shot. He saw Williams crawling on the floor and heard Rucci yelling at him to keep his head down. He also heard the video game machines being broken into. Hovekamp identified Mapes as the man he saw carrying a shotgun during this event. A few days after the murder, he was shown approximately ten photos by police. He picked three. He told police that one in particular looked like the man he had seen with the shotgun. That photo was of David Mapes. On February 11, 1983 Hovekamp selected Mapes from a line-up.

Michael Reese testified that the defendant spoke to him in the Town House Apartments' parking lot about robbing Chaps. Mapes told Reese that he had a gun. Mapes suggested that they break into the pinball machines with a crowbar which he had also acquired. Mapes further said that

a Sunday morning would be the best time for a robbery because all the receipts from the week would be there. Reese stated that he saw a newscast of the Chaps murder and robbery on the evening of January 30, 1983. Reese contacted and informed the police about the conversation that he had with Mapes. He related the conversation to Detective George Kunz. Reese also testified that he saw defendant in the county jail about March 30, 1983 after Mapes was arrested and Reese was, at that time, confined in jail for another matter. Mapes told Reese at that time that he was concerned about Newton's statement; however, he was not too worried about Reese's and Hayward Chambers' statements.

In April two men came to Reese's house to allegedly investigate the crime. Reese called the Homicide Department of the Cleveland Police and determined that the men had not been sent by the police. As a result of this event, Reese went to see the defendant's wife and asked her to have Mapes call him. Defendant called Reese on May 1, 1983. Mapes told Reese in that telephone conversation that he wished what happened in the bar "could have been another way." Mapes also stated that he got about $1,000 out of the robbery.

Christine Alexander, another resident of the Towne House Apartments, testified that Peaches Mapes often came to visit her apartment. On the evening of January 29 several people were in Alexander's apartment including defendant, Peaches, Hayward Chambers (Alexander's son), and Clarence Johnson. She overheard Mapes approach Johnson about robbing "Jack's" bar. She also heard Mapes trying to persuade Johnson to go next door. Mapes and Johnson went to Chaps for a drink. Later that evening Mapes brought a bag into Alexander's apartment and placed it into her closet. She later saw Mapes pull a shotgun out of this bag.

Hayward Chambers testified that the defendant showed him a shotgun about the middle of January, 1983. At that time defendant stated he had broken a window in Chaps and was going to get money out of the video game machines. Chambers also stated that on the morning of January 30, 1983 he spoke with Mapes who stated he wanted to get rid of some shotgun shells. Mapes told Chambers that he "dropped" a man. On January 31, 1983 Mapes attempted to persuade Chambers to give him money so that he could leave town because he was in trouble due to the incident at Chaps. Mapes also stated that if he had known Newton was going to get scared, he would have killed him too. He also said that if anyone talked, they would get the same. Chambers refused to give defendant any money.

Detective George Kunz testified that the defendant contacted the police in March after he found out that Newton had been arrested and that shotgun shells had been recovered from the drain in his former apartment. Mapes claimed that he had owned a shotgun for protection. He stated that his cat had played with the shotgun shells and knocked them down the drain. Mapes then stuffed the drain with paper and covered it with a rug. Mapes told police at that time that Newton and a man named "Red" were involved in the Chaps incident. The police were never able to locate the individual named "Red".

Detective James Svekric testified that when he was investigating the murder on the morning of January 30, 1983, he saw Mapes standing near the rear gate of the building in which Chaps was located. Svekric also stated that when he questioned Mapes, he denied being home on January 30. Mapes also denied owning a shotgun.

Officer Timothy Patton of the Cleveland Police testified that shortly after his arrest Mapes told police that he served as a lookout for Newton and "Red" outside of the Chaps

building. Furthermore, defendant said that he was unaware that a man had been murdered in the incident until the following day.

Officer Patrick H. Reynolds of the Cleveland Police Scientific Investigation Unit testified that the shotgun shell pellets taken from the drain in the defendant's apartment matched the pellets taken from the decedent's head. Reynolds also testified that the crowbar recovered from defendant's apartment matched marks made on the metal lids to the coin boxes on the video machines.

Peaches Mapes testified on behalf of her husband. She stated that her husband never told her that he had killed a man and that she did not see him stuff shotgun shells down the drain in their apartment. However, she did say that the defendant owned a sawed-off shotgun in January of 1983.

At the trial for the aggravating specification (R.C. 2929.04(A)(5)) Detectives John Rafferty and Thomas Henion of the City of Paterson, New Jersey Police Department, testified that defendant was arrested along with two other individuals for the murder of John Clark in March of 1972. Mapes entered a non vult plea to first degree murder and was found guilty by the New Jersey judge. A copy of the indictment and final judgment of conviction were admitted into evidence.

After defendant was found guilty of the two aggravated murder counts and the aggravating specification, the penalty hearing was held before the jury. Defendant made an unsworn statement in which he stated that he was not the triggerman in the 1972 New Jersey murder, and that he had no control over the events occurring in that incident. The defense presented no other evidence about mitigating factors.

Rodney Newton testified again at the penalty hearing. He stated that on March 23, 1983 Mapes asked Newton not to say anything about the incident at Chaps. The two men were placed in a holding cell together prior to a pretrial. Mapes also stated that he had been in a situation similar to this in New Jersey and his friends all refused to say anything to the police. As a result, Mapes said that he received only a short prison term. After appearing before the court that same day and hearing of Newton's statement, Mapes told Newton to watch himself when he went to jail because he was a "snitch".

Appellant assigns twelve errors on appeal.

"I. THE APPELLANT'S DEATH PENALTY SENTENCES MUST BE VACATED BECAUSE THE ONLY SPECIFICATION FOUND, A PRIOR NEW JERSEY MURDER CONVICTION BASED UPON A NON VULT PLEA, WAS USED AGAINST THE APPELLANT IN VIOLATION OF CRIM R 11(B)(2)."

"II. THE APPELLANT'S DEATH PENALTY SENTENCES MUST BE VACATED BECAUSE THE ONLY SPECIFICATION WAS FOUND BY USING EVIDENCE OF A PRIOR NON VULT PLEA AGAINST THE APPELLANT IN VIOLATION OF EVIDENCE RULE 410."

As the first two assignments of error are related in law and fact, they will be addressed together.

Appellant contends that his conviction of the aggravating specification under R.C. 2929.04(A)(5) must be reversed because evidence of a non vult plea by defendant in the New

Jersey conviction was admitted contrary to the provisions of Crim. R. 11(B)(2)[10] and Evid. R. 410.[11] The New Jersey judgment entry of conviction happened to include the fact that defendant entered a plea of non vult.

We do agree with appellant that a plea of non vult is the equivalent to a plea of nolo contendre or of no contest for purposes of Crim. R. 11(B)(2) and Evid. R. 410. *See* WRIGHT, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL §177 (1982); Annot., 89 A.L.R. 2d 540 91963). However, we do not agree with appellant that the introduction of the New Jersey judgment entry of his conviction which also referred to his plea of non vult in this case resulted in reversible error.

It is important to point out the Crim. R. 11(B)(2) and Evid. R. 410 only prohibit the admission of no contest pleas. They do not prohibit the introduction of a judgment of conviction subsequent to such a plea when that conviction is deemed relevant by statute or the Rules of Evidence to an issue at trial. However, appellant's non vult plea and his sentence upon conviction are contained in the same New Jersey judgment entry.

Defense counsel's objection to the introduction of the judgment was based on the fact that it did not contain specific reference to appellant's conviction for murder and that the entry was not properly authenticated. These contentions lack merit. The purpose for introduction by the state at the specification hearing of the New Jersey indictment and judgment entry was to help prove appellant's prior conviction for murder, not that he entered a plea of non vult. Under these circumstances we find no violation of Crim. R. 11(B)(2) or Evid. R. 401.

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[10] *See* Appendix.

[11] *See* Appendix.

We also see no prejudice in the admission of this evidence. The determination of guilt as to the aggravating specification for conviction of a prior purposeful killing was tried to the trial judge. A reviewing court will not reverse the judgment of a trial court, following a bench trial, on the ground that erroneous evidence was admitted, unless the court expressly based its judgment in part upon inadmissible evidence or the judgment was not supported by sufficient competent evidence. *Beamer v. Beamer* (1969), 17 Ohio App. 2d 89, 96.

In the case *sub judice*, the trial court did not base its decision exclusively upon the non vult plea. Substantial evidence was admitted that appellant was previously convicted of the New Jersey murder. Detectives Henion and Rafferty of the City of Paterson in New Jersey testified at the proceedings conducted by the trial judge that appellant was convicted of that prior murder.

Finally, we do not see how the mention of the non vult plea by defense counsel could have prejudiced appellant at the sentencing phase. The prosecutor did not at any time attempt to use the plea as an admission of guilt to the jury. The jury was merely told at that time that appellant was guilty of the aggravating specification of a prior purposeful killing. They were instructed to weigh any mitigating factors against that aggravating circumstance. At that point, a determination of guilt had been made by the jury and a finding of guilt as to the specification had been made by the court. Furthermore, appellant presented no evidence, other than his unsworn statement, of any mitigating factors. Thus, the jury was constrained to recommend the death penalty.

In addition, in analagous cases it has been held that a prior conviction based on a plea of no contest is admissible for enhancement of punishment in a subsequent prosecution

for the same type of offense. *State v. Rivers* (Aug. 22, 1984), Ct. App. 2d Dist. No. 83 CA-90, unreported. *See generally People v. Gordon* (Colo. 1979), 593 P.2d 326; 89 A.L.R. 2d, 540 (1963).

The first two assignments of error are overruled.

"III. THE PROVISIONS OF R.C. 2929.03 (C)(D) REQUIRING THE USE OF THE SAME JURY AT BOTH THE GUILT PHASE AND SENTENCING PHASE OF A CAPITAL CASE ARE UNCONSTITUTIONAL AS DRAWN SINCE AN ACCUSED IS, AND IN THIS CASE THE APPELLANT WAS, DENIED THE FUNDAMENTAL RIGHTS OF AN IMPARTIAL JURY, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTIONS TEN AND SIXTEEN OF THE OHIO CONSITUTION."

"A. BECAUSE R.C. 2929.03 (C)(D) MANDATES USE OF THE SAME JURY IN BOTH THE GUILT AND SENTENCING PHASES JURORS MUST BE 'DEATH-QUALIFIED' A PROCESS WHICH, AS DONE IN APPELLANT'S TRIAL OVER OBJECTION, VIOLATES AN ACCUSED'S AND HERE APPELLANT'S, CONSTITUTIONAL GUARANTEES TO AN IMPARTIAL JURY, EQUAL PROTECTION AND DUE PROCESS OF LAW IN THE DETERMINATION OF GUILT OR INNOCENCE."

"B. BY REQUIRING AN ACCUSED AND COUNSEL TO ADDRESS THE SAME JURY AT BOTH THE GUILT AND THE SENTENCING PHASES R.C. 2929.03 (C)(D) PROVIDES FOR A PROCEDURE WHICH VIOLATES AN ACCUSED'S, AND IN THIS CASE THE APPELLANT'S CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE COUNSEL, AN IMPARTIAL JURY AND DUE PROCESS OF LAW."

Appellant asserts that the Ohio statutory scheme which allows the same jury to hear both the guilt and penalty phases of a capital case denies an accused an impartial jury at the guilt phase of trial. By this appellant means that the selection of a "death qualified" jury pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, does not result in impartiality because (1) "death qualified" juries are not representative of a fair cross-section of the community; and (2) "death qualified" jurors are conviction prone. Appellant further contends he was denied effective assistance of counsel at the penalty phase because his attorney who argued for appellant's innocence at the guilt phase cannot be an effective advocate at the sentencing phase.

In *Witherspoon*, the Supreme Court first considered the issue of "death qualified" jurors in which it stated exclusion of those individuals who stated "they would not even consider returning a verdict of death" was proper. 391 U.S. at 520. Twelve years later in *Adams v. Texas* (1980), 448 U.S. 38, 46, the court held:

"THIS LINE OF CASES ESTABLISHES THE GENERAL PROPOSITION THAT A JUROR MAY NOT BE CHALLENGED FOR CAUSE BASED ON HIS VIEWS ABOUT CAPITAL PUNISHMENT UNLESS THOSE VIEWS WOULD PREVENT OR

SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS INSTRUCTIONS AND HIS OATH. THE STATE MAY INSIST, HOWEVER, THAT JURORS WILL CONSIDER AND DECIDE THE FACTS IMPARTIALLY AND CONSCIENTIOUSLY APPLY THE LAW AS CHARGE BY THE COURT."

Ohio has codified authorization for a challenge for cause in such situations in R.C. 2945.25(C):

"(C) IN THE TRIAL OF A CAPITAL OFFENSE, THAT HE UNEQUIVOCALLY STATES THAT UNDER NO CIRCUMSTANCES WILL HE FOLLOW THE INSTRUCTIONS OF A TRIAL JUDGE AND CONSIDER FAIRLY THE IMPOSITION OF A SENTENCE OF DEATH IN A PARTICULAR CASE. A PROSPECTIVE JUROR'S CONSCIENTIOUS OR RELIGIOUS OPPOSITION TO THE DEATH PENALTY IN AND OF ITSELF IS NOT GROUNDS FOR A CHALLENGE FOR CAUSE. ALL PARTIES SHALL BE GIVEN WIDE LATITUDE IN VOIR DIRE QUESTIONING IN THIS REGARD."

Appellant does not dispute that a jury may be "death qualified" in the penalty phase, but rather argues that because Ohio allows that "death qualified" jury to also hear the guilt phase a conviction-prone jury is the result. Appellant cites to *Grigsby v. Mabry* (E.D. Ark. 1983), 569 F. Supp. 1273, in support of this theory. *Grigsby* contains empirical data which lends credence to appellant's argument under this assignment of error.

This court has previously considered *Grigsby* and its rationale that death qualification results in a jury more likely to convict in the penalty phase. In *State v. Jenkins* (Feb. 24, 1984), Cuyahoga App. No. 45231, it was held:

> "FIRST, WE ARE MINDFUL OF THE LIMITATIONS INHERENT IN THE STUDIES WITH WHICH DEFENDANT HAS PROVIDED US, SOME OF WHICH ARE DISCUSSED IN *GRIGSBY*. WE ARE DUBIOUS ABOUT GENERALIZING THE RESULTS OF SUCH LIMITED DATA. BUT, EVEN IF WE ASSUME THAT A SO-CALLED 'DEATH QUALIFIED' JURY IS MORE LIKELY TO CONVICT, DEFENDANT WAS NOT THEREBY DENIED A FAIR TRIAL. SEE *SMITH V. BALKOM* (C.A. 5,1981), 660 F.2D 573, MODIFIED, 671 F. 2D 858, CERT. DENIED, 103 S. CT. 181 (1982); *CALIFORNIA V. FIELDS, SUPRA*."

> "EACH PARTY IS GUARANTEED THE RIGHT TO A JURY WHICH DOES NOT DESIGNEDLY EXCLUDE A FAIR CROSS SECTION OF DEMOGRAPHICALLY DISTINCTIVE POPULATION GROUPS. *DUREN V. MISSOURI* (1979), 439 U.S. 357; *TAYLOR V. LOUISIANA* (1975), 419 U.S. 522. FURTHER, EACH PARTY IS ENTITLED TO A JURY WHICH DOES NOT DESIGNEDLY INCLUDE JURORS WITH AN IDENTIFIABLE ANTAGONISM OR PREJUDICE. THE CONSTITUTION GUARANTEES THESE JURY CHARACTERISTICS FOR THE ACCUSED IN A CRIMINAL CASE. PROCEDURAL EQUITY DEMANDS THAT THE STATE BE ACCORDED THE SAME RIGHTS. SEE *WILLIAMS V. WAINWRIGHT* (C. A. 5, 1970),

427 F. 2D 921, 923; *SPINKELLINK V. WAINWRIGHT* (C.A. 5, 1978), 578 F. 2D 582, 596, CERT. DENIED, 99 S. CT. 1548 (1979)."

"THERE IS NO CONSTITUTIONAL, STATUTORY, JUDICIAL, OR COMMON LAW RULE THAT GUARANTEES A COMPLETELY IMPARTIAL JURY IN AN ABSOLUTE SENSE. NO PERSON THAT TAKES HIS OR HER PLACE AS A JUROR IS FREE FROM ALL ATTITUDES, BIASES OR PREJUDICES, LATENT OR OVERT. A JUROR'S ATTITUDINAL SET NECESSARILY REFLECTS HIS OR HER INDIVIDUAL EXPERIENCES."

"THE LAW GUARANTEES ONLY THAT EACH PARTY MAY EXCLUDE FOR CAUSE THOSE JURORS WHOSE ANSWERS DEMONSTRATE PARTIALITY. ADDITIONALLY, THE LAW ACCORDS EACH PARTY AN OPPORTUNITY TO EXCUSE A LIMITED NUMBER OF PROSPECTIVE JURORS BY PEREMPTORY CHALLENGES, INCLUDING THOSE WHOM THAT PARTY PERCEIVES AS ANTAGONISTIC."

"THUS, JURORS WHO CLEARLY INDICATE THAT THEIR ATTITUDES WILL PREVENT THEM FROM DECIDING THE CASE ACCORDING TO THE LAW ARE PROPERLY EXCLUDED FOR CAUSE. *ADAMS V. TEXAS* (1980), 448 U.S. 38, 44-45. IF DEFENDANT HAD A RIGHT TO JURORS WHO WOULD NOT APPLY THE LAW, THE STATE WOULD LOSE ITS RIGHT TO EXCLUDE UNCONTROLLABLY BIASED JURORS. THERE IS NO CONSTITUTIONAL GUARANTEE THAT AN ACCUSED

WILL HAVE JURORS WHO OPPOSE CAPITAL PUNISHMENT OR HOLD ANY OTHER SPECIFIED VIEW. DEFENDANT HAS FAILED TO ALLEGE ANY RIGHTS THAT OUTWEIGH THE STATE'S RIGHT TO JURORS WHO WILL FOLLOW THE LAW."

"DEFENDANT ALSO ARGUES THAT THIS EXCLUSION PROCESS DENIED HIM HIS RIGHT TO A JURY DRAWN FROM A FAIR CROSS SECTION OF THE COMMUNITY, CITING *TAYLOR V. LOUISIANA* (1975), 419 U.S. 522. HOWEVER , TAYLOR AND ITS PROGENY ARE NOT APPLICABLE HERE."

"THE STATE CANNOT EXCLUDE JURORS WITH IMPORTANT COMMUNITY ATTITUDES LIKE PHILOSOPHICAL OPPOSITION TO CAPITAL PUNISHMENT IF THOSE JURORS CAN STILL FOLLOW THE LAW. HOWEVER, THE CONSTITUTIONAL REQUIREMENT THAT JURORS BE CHOSEN FROM A FAIR CROSS SECTION OF THE COMMUNITY DOES NOT RELATE TO COMMUNITY ATTITUDES. RATHER, IT CONCERNS GROUPS WITH DEMOGRAPHICALLY DISTINCTIVE CHARACTERISTICS, SUCH AS RACE, SEX, NATIONAL ORIGIN, OR RELIGION. *CALIFORNIA V. FIELDS, SUPRA; STATE V. PUENTE, SUPRA*, AT 138-139. IT APPLIES TO GROUPS SUBJECT TO COMMUNITY PREJUDICE. *HERNANDEZ V. TEXAS* (1954), 347 U.S. 475; *SWAIN V. ALABAMA* (1965), 380 U.S. 202, 205."

"'NOTHING IN *TAYLOR* GUARANTEES THAT A RIGHT TO A REPRESENTATIVE JURY INCLUDES THE RIGHT TO BE TRIED BY

JURORS WHO HAVE EXPLICITLY INDICATED THEIR INABILITY TO FOLLOW THE LAW AND THE INSTRUCTIONS OF THE TRIAL JUDGE.' *LOCKET V. OHIO, SUPRA* AT 596-597."

This court's position in *Jenkins* seems to be consistent with the current position of the United States Supreme Court. In *Maggio v. Williams* (1983), ____ U.S. ____, 104 S. Ct. 311, the court vacated a stay of execution where one of the issues was that the jury which convicted the defendant had been "death qualified." Hence, that defendant argued the jury was not representative of the population. The court held that further review was not necessary since the voir dire was in compliance with *Witherspoon*. Moreover, the Supreme Court has approved of the bifurcated trial procedure employed in this state. In *Gregg v. Georgia* (1976), 428 U.S. 153, the court stated the Georgia death penalty procedure, remarkably similar to Ohio's, was constitutionally permissible.

Our review of the record reveal that all of the jurors who were excused based on the "death qualification" guidelines (Loieri, Bickerstaff, Hill, McCastle, Lesko, Fagan, Allevato and Kilty) were properly excused after they had unequivocally stated they would not be able to follow the law and vote to impose the death penalty under any circumstances. Thus, the voir dire was in compliance with all of the relevant constitutional and statutory provisions.

Appellant also argues when two issues were tried by the same jury he was denied effective assistance of counsel at sentencing because of possible inconsistent positions taken by counsel at the two different phases of trial.

Clearly a defendant has the Sixth Amendment right to counsel at the sentencing phase of the proceedings. See *Mempa v. Rhay* (1967), 389 U.S. 128. However, to prevail

on an ineffective assistance of counsel argument, a defendant must show (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington* (1984), ____ U.S. _____, 104 S. Ct. 2052. We hold that appellant's counsel was able to and did perform his duties in keeping with the statutory framework established in the bifurcated trial procedure. This court has previously held with regard to bifurcated trials that "counsel's duty to select among possible defense positions does not deny his client effective assistance." *State v. Shields* (January 26, 1984), No. 46012. Furthermore, appellant has failed to evince any prejudice arising from the trial procedure.

We overrule appellant's third assignment of error.

"IV. THE JURY'S VERDICT OF GUILTY ON COUNTS ONE AND TWO, AND NOT GUILTY ON THE FIRST AND SECOND SPECIFICATIONS IN EACH COUNT, ARE INCONSISTENT RESPONSES ARISING OUT OF THE SAME COUNT, FOR WHICH THE APPELLANT'S CONVICTIONS SHOULD BE REVERSED FOR THE JURY'S FAILURE TO PROPERLY APPLY INSTRUCTIONS."

At the conclusion of the guilt or innocence phase of the trial, the jury found the appellant guilty of two counts of aggravated murder. However, he was found not guilty of specifications one and two under each count. Appellant argues that the verdicts are inconsistent and the guilty verdicts should be reversed.

The two aggravated murder counts read as follows:

COUNT ONE:

"[T]HE ABOVE NAMED DEFENDANT(S) . . . UNLAWFULLY AND PURPOSELY CAUSED THE DEATH OF ANOTHER, TO-WIT: JOHN ALLEN, WHILE COMMITTING OR ATTEMPTING TO COMMIT, OR WHILE FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AN AGGRAVATED ROBBERY."

COUNT TWO:

"[T]HE ABOVE NAMED DEFENDANT(S) . . . UNLAWFULLY AND PURPOSELY CAUSED THE DEATH OF ANOTHER, TO-WIT: JOHN ALLEN, WHILE COMMITTING OR ATTEMPTING TO COMMIT OR WHILE FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AN AGGRAVATED BURGLARY."

On each count of aggravated murder, appellant was found not guilty of these two specifications:

"THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE PRESENTED ABOVE WAS COMMITTED WHILE THE OFFENDER WAS COMMITTING OR ATTEMPTING TO COMMIT OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AGGRAVATED ROBBERY AND EITHER THE OFFENDER WAS THE PRINCIPAL OFFENDER IN THE COMMISSION OF THE AGGRAVATED MURDER, OR IF NOT THE PRINCIPAL OFFENDER, COMMITTED THE AGGRAVATED MURDER WITH PRIOR CALCULATION AND DESIGN; AND/OR"

"THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE PRESENTED ABOVE WAS COMMITTED WHILE THE OFFENDER WAS COMMITTING OR ATTEMPTING TO COMMIT OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AGGRAVATED BURGLARY, AND EITHER THE OFFENDER WAS THE PRINCIPAL OFFENDER IN THE COMMISSION OF THE AGGRAVATED MURDER, OR IF NOT THE PRINCIPAL OFFENDER, COMMITTED THE AGGRAVATED MURDER WITH PRIOR CALCULATION AND DESIGN;"

Appellant argues that the verdicts are inconsistent because they seem to say appellant purposefully caused the death of John Allen during the course of an aggravated robbery and an aggravated burglary while at the same time saying he was not guilty of such offenses.

We find the verdicts are not inconsistent. *State v. Brown* (1984), 12 Ohio St. 3d 147. It was held in *State v. Perryman* (1976), 49 Ohio St. 2d, 14, *vacated on other grounds*, 438 U.S. 911, that an inconsistency between a guilty verdict of the principal charge and a not guilty verdict of a specification will not warrant reversal of the guilty verdict. The court stated at syllabus three as follows:

"3. WHERE A JURY CONVICTS A DEFENDANT OF AN AGGRAVATED MURDER COMMITTED IN THE COURSE OF AN AGGRAVATED ROBBERY, AND WHERE THAT DEFENDANT IS CONCURRENTLY ACQUITTED OF A SPECIFICATION INDICTING HIM FOR

IDENTICAL BEHAVIOR, THE GENERAL VERDICT IS NOT INVALID."

Therefore, in this case, the guilty verdicts as to the two counts of aggravated murder are not rendered invalid by the jury's finding on the two specifications.[12]

This assignment of error is overruled.

"V. THE OHIO DEATH PENALTY STATUES ARE UNCONSTITUTIONAL BECAUSE THEY ALLOW A DEFENDANT, SUCH AS THE APPELLANT IN THIS CASE, TO RECEIVE THE DEATH PENALTY FOR ONLY BEING AN ACCOMPLICE, IN VIOLATION OF THE UNITED STATES SUPREME COURT MANDATE IN *ENMUND V. FLORIDA*, 102 St. Ct. 3368 (1982)."

Appellant contends that the Ohio statutes regarding aggravated murder and the death penalty are contrary to the directive set out in *Enmund v. Florida* (1982), 458 U.S. 782. We preface our discussion under this assignment with the comment that the overwhelming evidence indicates that defendant was the principal offender and that he personally shot and killed John Allen. Because the jury found him guilty of aggravated murder, it is unnecessary to establish whether he was the principal offender or an aider and abettor.

---

[12] A close reading of the language in the principal charge and the two specifications reveals that there is not necessarily an inconsistency in a guilty verdict of aggravated murder (R.C. 2903.01 (B)) and not guilty of the two specifications involved. An individual can be convicted of aggravated felony murder as an accomplice but not found to have prior calculation and design. Thus, a person would not be guilty of the aggravating specification set out in R.C. 2929.04 (A)(7).

Whether he was the principal only becomes an issue when looking at the penalty enhancing specification. R.C. 2929.04(A)(7).

In *Enmund* the Supreme Court held that the Eighth Amendment, which forbids cruel and unusual punishment, prohibits imposition of the death penalty where a defendant aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill or *intend* that a killing take place or that deadly force be used. 102 S. Ct. at 3376-77. The statute does not violate *Enmund*.

The pertinent portions of R.C. 2903.01, the aggravated murder statute provide as follows:

> "(B) NO PERSON SHALL *PURPOSELY* CAUSE THE DEATH OF ANOTHER WHILE COMMITTING OR ATTEMPTING TO COMMIT, OR WHILE FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT KIDNAPPING, RAPE, AGGRAVATED ARSON OR ARSON, AGGRAVATED ROBBERY OR ROBBERY, AGGRAVATED BURGLARY OR BURGLARY, OR ESCAPE."
>
> * * *
>
> "(D) *NO PERSON SHALL BE CONVICTED OF AGGRAVATED MURDER UNLESS HE IS SPECIFICALLY FOUND TO HAVE INTENDED TO CAUSE THE DEATH OF ANOTHER.* IN NO CASE SHALL A JURY IN AN AGGRAVATED MURDER CASE BE INSTRUCTED IN SUCH A MANNER THAT IT MAY BELIEVE THAT A PERSON

COMMITS OR ATTEMPTS TO COMMIT ANY OFFENSE LISTED IN DIVISION (B) OF THIS SECTION TO BE CONCLUSIVELY INFERRED, BECAUSE HE ENGAGED IN A COMMON DESIGN WITH OTHERS TO COMMIT THE OFFENSE BY FORCE AND VIOLENCE OR BECAUSE THE OFFENSE AND THE MANNER OF ITS COMMISSION WOULD BE LIKELY TO PRODUCE DEATH, TO HAVE INTENDED TO CAUSE THE DEATH OF ANY PERSON WHO IS KILLED DURING THE COMMISSION OF, ATTEMPT TO COMMIT, OR FLIGHT FROM THE COMMISSION OF AN ATTEMPT TO COMMIT, THE OFFENSE. IF A JURY IN AN AGGRAVATED MURDER CASE IS INSTRUCTED THAT A PERSON WHO COMMITS OR ATTEMPTS TO COMMIT ANY OFFENSE LISTED IN DIVISION (B) OF THIS SECTION MAY BE INFERRED, BECAUSE HE ENGAGED IN A COMMON DESIGN WITH OTHERS TO COMMIT THE OFFENSE BY FORCE OR VIOLENCE OR BECAUSE THE OFFENSE AND THE MANNER OF ITS COMMISSION WOULD BE LIKELY TO PRODUCE DEATH, TO HAVE INTENDED TO CAUSE THE DEATH OF ANY PERSON WHO IS KILLED DURING THE COMMISSION OF OR ATTEMPT TO COMMIT THE OFFENSE, THE JURY ALSO SHALL BE INSTRUCTED THAT THE INFERENCE IS NON CONCLUSIVE, THAT THE INFERENCE MAY BE CONSIDERED IN DETERMINING INTENT, THAT IT IS TO CONSIDER ALL EVIDENCE INTRODUCED BY THE PROSECUTION TO INDICATE THE

> PERSON'S INTENT AND BY THE PERSON TO INDICATED HIS LACK OF INTENT IN DETERMINING WHETHER THE PERSON SPECIFICALLY INTENDED TO CAUSE THE DEATH OF THE PERSON KILLED, AND THAT THE PROSECUTION MUST PROVE THE SPECIFIC INTENT OF THE PERSON TO HAVE CAUSED THE DEATH BY PROOF BEYOND A REASONABLE DOUBT." (*EMPHASIS ADDED.*)

Hence, an individual is not guilty of aggravated murder in Ohio unless he specifically intended to cause the death of another. Additionally, he cannot be given the death penalty unless he intended to kill *and* was convicted of one of the aggravating circumstances listed in R.C. 2929.04. *Enmund* seeks to prevent the death penalty being imposed in situations where a defendant is a participant in a felony, but he had no intention that a person be killed during the crime. *See generally* R.C. 2903.04(A) (Involuntary manslaughter is a felony when a person dies as the proximate result of the defendant's commission of a felony. No specific intent is required as to the causation of death.)

We, therefore, conclude that the Ohio statutory scheme which provides for the imposition of the death penalty adheres to the requirements established in *Enmund*. By finding appellant guilty of the principal offenses in Counts I and II the jury found that appellant purposefully caused the death of John Allen during the course of an aggravated robbery and aggravated burglary. The verdict demonstrates the jury found defendant to have the requisite mental culpability.

The fifth assignment of error lacks merit.

"VI. THE CUMULATIVE CONDUCT OF THE PROSECUTORS IN SUGGESTING THE APPELLANT MAY BE A HOMOSEXUAL, COMMENTING ON HIS RIGHT NOT TO TESTIFY, AND INTRODUCING INNUENDOS CONCERNING POSSIBLE BAD ACTS, DENIED THE APPELLANT A FAIR TRIAL."

Appellant contends that the prosecutor's comments and questions in three areas, two during voir dire and one during the State's case in chief, constituted such egregious error as to have denied him a fair trial. Since we do not concur in appellant's assessment of the prosecutor's conduct, we overrule the sixth assignment of error.

Appellant first complains about a question asked during voir dire. The prosecutor asked during voir dire: "Now, in the course of the trial evidence may come out that the defendant is a homosexual too, and that wouldn't mean anything to you either, will it?" (T. 573). No evidence was elicited during trial that the defendant was a homosexual.

We do not think this question was relevant to the case. While it had the potential for inflammatory impact on the jury, *see e.g., State v. Tolliver* (March 15, 1984), Cuyahoga App. No. 46277, no prejudice is exemplified here.

Prosecutorial misconduct will only result in reversal error where the misconduct was "so flagrant as to prevent a fair trial." *State v. Carver* (1972), 30 Ohio St. 2d 280. *See e.g., State v. Liberatore* (1982), 69 Ohio St. 2d 583. There was no prejudice as no evidence was introduced which even insinuated that defendant was a homosexual. The conduct of defense counsel also supports our conclusion. When asked by the judge if he wanted a curative instruction given to the jury, he declined.

Appellant also contends that a new trial should be granted on the prosecution's comments during voir dire on whether or not the appellant would take the stand.

During voir dire, the prosecutor stated as follows:

> "Now, again, the defendant may or he may not testify. It is totally up to him. Everybody says they understood that and accepted that."
>
> "If the defendant does not testify, you may use his failure to testify for any purpose. Does everybody understand that? Does everybody accept that completely, that you are not to let that influence your decision in this case whatsoever?"
>
> "Again, I take it from everyone's silence that they would not let his failure to testify – no one would use it against him at all."
>
> "Now, on the other hand, if the defendant chooses to testify, you will judge his credibility as you would anyone else's, would you not?" (T. 603, 604).

The prosecutor again commented as follows:

> "If David Mapes testifies and again, you know, that he doesn't have to testify, but if he doesn't testify, you are not going to hold that against him, are you?" (T. 919).

A prosecuting attorney is barred from commenting upon a defendant's silence at trial because of the guarantee against self-incrimination of the Fifth and Fourteenth Amendments to the United States Constitution. *Griffin v. California* (1965), 380 U.S. 609. Thus, it was improper for the

prosecutor to comment at voir dire on the fact defendant may not testify. Even though the prosecutor did not openly impeach appellant in this manner, he improperly planted the seeds for doubt in the jury's minds by **any** comment on the matter. However, a reviewing court may not automatically reverse a conviction when there has been a *Griffin* error. The harmless error doctrine must be applied. *United States v. Hastings* (1983), ___ U.S. ___, 103 S.Ct. 1974, 1981. The court in *Hastings* stated: "The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" We come to the conclusion the answer is emphatically yes.

A review of the strong evidence against the appellant indicates that the case against him was overwhelming. Furthermore, the trial court properly instructed the jury on the defendant's right not to take the stand. (T. 3672). Therefore, the prosecutor's comments were harmless error.

Finally, appellant argues that the testimony of Michael Reese concerning the two men who approached him at his home and asked about his planned testimony at appellant's trial was error. (See pp. 5 and 6 of the facts). He argues this evidence prejudiced the appellant by its insinuation that he was the person who sent the two men to frighten Reese. Thus, appellant claims the evidence was inadmissible under Evid. R. 404. We disagree.

The evidence was properly admitted. It was not used to show that the appellant sent the two men to intimidate Reese as an admission of the crimes. In fact, no evidence was elicited that the men were in any way connected with Mapes. It explained the chain of events leading to the call made by Mapes from Jail to Reese in which appellant made a number of incriminating statements. Reese stated that after talking to

the two men, he went to see the appellant's wife. He asked her to have the appellant call him. On May 1, 1983 Mapes called Reese and stated with regard to the Chaps incident that, "he wished it could have been another way, he wasn't intending for it to happen that way ...." (T. 2525). Mapes also told Reese at that time that he got about one thousand dollars from the robbery and that about one of the victims, "he wished he hadn't made a certain move or some kind of move that he made." (T. 2526, 2528).

The evidence was also relevant to bolster the credibility of the witness. Reese had a history of convictions for felonies. It was necessary to explain why the witness spoke with appellant just prior to trial since evidence was presented that the two men were only acquaintances.

"VII. THE APPELLANT WAS DENIED TRIAL BY AN IMPARTIAL JURY BECAUSE OF THE TRIAL COURT'S REFUSAL TO VOIR DIRE POTENTIAL JURORS INDIVIDUALLY AND IN SEQUESTRATION."

"A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY 'DEATH QUALIFYING' JURORS IN THE PRESENCE OF ONE ANTOHER," AND

"B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY VOIR DIRE QUESTIONING OF JURORS IN THE PRESENCE OF ONE ANOTHER."

Appellant contends that it was reversible error to not individually voir dire prospective jurors because the impact of such questions suggests that the appellant is guilty and would result in a biased jury.

Appellant relies on the case of *Hovey v. Superior Court of Alameda Cty.* (1980), 168 Cal. Rptr. 128, 6161 P.2d 1301. The California Supreme Court stated that when a jury is being death qualified, the voir dire should be conducted individually and in sequestration. That court based its conclusion on a number of empirical studies. One study in particular stated that a juror becomes more likely to impose the death penalty where he views his fellow venire persons being death qualified. 616 P.2d at 1353. *See also State v. Timmons* (1983), 192 N.J. Super. 141, 469 A.2d 46.

We agree with the California Supreme Court that such result is possible. Therefore, we would encourage the use of individual voir dire when qualifying jurors involving the death penalty. However, in the case *sub judice* appellant has exemplified no prejudice resulting from the procedure used.

The question of whether a voir dire should be conducted in sequestration is a matter of discretion by the trial judge. *State v. Gall* (1980), 65 Ohio App. 2d 57. Therefore we adhere to the holding of a number of jurisdictions that a motion to sequester jurors during voir dire in capital cases is within the discretion of the trial court and will not be reversed without a showing of abuse of discretion. *Louisiana v. Kirkpatrick* (1983), 443 So.2d 546; *Lexington Herald-Leader Company, Inc. v. Meigs* (Ky. 1983, 660 S.W. 2d 658; *North Carolina v. Adcock Meigs* (1983), 310 N.C. 1, 310 S.E.2d 587. Appellant has demonstrated no abuse of discretion or prejudice in the instant case.

Thus, we overrule this assignment of error.

"VIII. APPELLANT'S CONVICTION IN COUNTS ONE AND TWO UNDER R.C. 2903.01 AND R.C. 2929.04(A)(5) MUST BE REVERSED AS IT CANNOT BE CONCLUDED FROM THE RECORD THAT APPELLANT WAS REPRESENTED BY COUNSEL AT HIS ARRAINGMENT FOR SUCH CHARGES."

Appellant complains that he was not represented by counsel at his arraignment. Appellant entered a plea of not guilty at that time. An objection was put on the record by defense counsel that Mapes was improperly deprived of counsel at a critical stage. This objection was made at the conclusion of the guilt phase of the trial heard by the jury but prior to the hearing on the prior murder specification.

A journal entry dated April 21, 1983 shows that appellant was arraigned on April 15, 1983. At that time appellant was advised of his constitutional rights, including the right to counsel. The trial judge (not the same as the arraignment judge) took judicial notice that appellant was represented by counsel at arraignment even though there was no evidence to that effect. (T. 3871).

Whether or not defendant was represented by counsel at arraignment was not prejudicial. In Ohio arraignment is not a critical stage of prosecution because no defenses are lost. *Brady v. Blair* (S.D. Ohio, 1976), 427 F.Supp. 5.

R.C. 2943.03 provides in pertinent part as follows: "The court may, for good cause shown, allow a change of plea at any time before the commencement of trial." The Ohio Supreme Court has interpreted the language in the statute to mean that where an indigent pleads to an indictment without counsel, subsequent appointment of counsel places him in the same place he stood prior to arraignment. Appointment of counsel constitutes good cause, and a subsequent refusal by a

trial court to permit the change of plea would constitute an abuse of discretion. *Dean v. Maxwell* (1963), 174 Ohio St. 193; *Vitoratos v. Maxwell* (6th Cir. 1965), 351 F.2d 217.

Furthermore, since the appellant made no incriminating statements at arraignment, he was not otherwise prejudiced by the absence of counsel because he entered a plea of not guilty. Moreover, the April 21, 1983 journal entry indicates appellant was read his rights pursuant to Crim. R. 10.

We overrule this assignment of error.

"X. UNDER R.C. 2941.25(A), THE APPELLANT CANNOT BE CONVICTED OF TWO COUNTS OF AGGRAVATED MURDER AND TWO COUNTS OF HAVING A FIREARM WHILE COMMITTING THE AGGRAVATED MURDER COUNTS, WHEN THERE WAS ONLY ONE HOMICIDE COMMITTED WITH ONE GUN, AND THEREFORE, APPELLANT CANNOT RECEIVE TWO DEATH PENALTY SENTENCES OR IN THE ALTERNATIVE, TWO LIFE SENTENCES AND TWO MANDATORY THREE YEAR TERMS."

Appellant argues that the two counts of aggravated murder, both under R.C. 2903.01(B), are allied offenses of similar import. Therefore, he contends that his conviction and punishment on both counts violates R.C. 2941.25. We agree, and one conviction must be set aside.

In the first count appellant was convicted of felony murder while committing an aggravated robbery. The second count was felony murder during an aggravated burglary. Only one homicide actually occurred.

R.C. 2941.25 provides:

> "(A) **Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.**"
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." (Emphasis added.)

Ohio courts have consistently held that a person cannot be convicted of more than one count of aggravated murder for a single homicide. *State v. Osborne* (1976), 49 Ohio St. 2d 135; **vacated on other grounds**, 438 U.S. 911; *State v. Spisak* (July 19, 1984), Cuyahoga App. Nos. 47458, 47459; *State v. Morales* (Dec. 16, 1982), Cuyahoga App. Nos. 44145, 44146, 44279, 44280, 45802; *State v. Guy* (Dec. 31, 1980), Cuyahoga App. No. 42225; *State v. Morningstar* (Butler, 1980), 19 Ohio Op. 3d 283.

Clearly the same conduct by Mapes in killing John Allen formed the basis for counts one and two of the indictment. On that basis, we sustain the tenth assignment of error. Appellant's conviction for aggravated murder on the second count of the indictment and the two specifications under that indictment is vacated.

"XI. APPELLANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL WERE VIOLATED IN THE SENTENCING PHASE WHEN THE PROSECUTOR, OVER OBJECTION, COMMENTED ON THE APPELLANT'S UNSWORN STATEMENT DOING SO IN A MANNER WHICH DIRECTLY REFERRED TO APPELLANT'S FAILURE TO TESTIFY DURING BOTH THE GUILT PHASE AND THE SENTENCING PHASE."

During the penalty phase of the trial, Mapes made an unsworn statement to the jury in which he stated that he was not the triggerman in the 1972 New Jersey murder. He also said that he had no control over the circumstances surrounding that murder. R.C. 2929.03(D)(1) allows a defendant to make an unsworn statement. He is not subject to cross-examination by doing so.

During the prosecutor's final argument, he stated:

> "You are supposed to look at the evidence hard, coldly, and say, is there mitigation, and does the defendant, he had the burden of going forward, he said to you, I chose not to take the oath.
>
> "By his taking the stand like he did, and by him not taking an oath, this is what he is telling you. Number one, I am not going to subject myself to any response whatsoever. From that testimony –
>
> "MR. CARLIN: Objection, your honor.
>
> "THE COURT: Overruled.

"MR. NUGENT: It means nothing.

"He says to you that he chooses not to be the same as you and take the oath that you took and every other witness took. He is the only person that came before you out of over 30 witnesses that didn't take the oath.

"And what should that mean to you? It should show you the kind of person that he is, that he doesn't want someone to question him about, well, if you say that you weren't the trigger man, let's get a little information about that. Let the prosecutor ask you a couple of questions." (t. 4154-4155).

This court previously addressed this issue in *State v. Jenkins* (Feb. 24, 1984), No. 45231, slip opinion at 42-44. At that time we stated that while *Griffin v. California* (1965), 380 U.S. 609, prohibits prosecutorial comment on a defendant's failure to testify, such protection does not extend to an unsworn statement which provides information otherwise not in the evidence. By statute the prosecutor is not allowed to cross-examine the defendant after he has made an unsworn statement. "However, the prosecutor should be allowed to argue that the defendant's statement has less credibility because it is not given under oath." *Jenkins* at 44.

Appellant's eleventh assignment of error is overruled.

"XII. THE COURT ERRED IN ADMITTING INTO EVIDENCE THE ITEMS SEIZED FROM THE APPELLANT'S APARTMENT AT THE TIME OF HIS ARREST."

Shortly before 6 a.m. on February 8, 1983 members of the Cleveland Police Department, including the SWAT unit, broke into appellant's apartment at the Towne House

Apartments. The police had an arrest warrant for David Mapes and a search warrant for his premises. The SWAT unit found appellant on his knees crawling to the bathroom where there was a hole in the screen to the bathroom window.

The police seized screwdrivers, a hammer and a crowbar from the apartment. Appellant sought to suppress these items before trial; however, the trial judge ruled that they were properly admissible.

At the suppression hearing Detective Kunz stated that he had spoken to Michael Reese prior to Mapes' arrest. In that conversation Reese told Kunz that Mapes had approached him about robbing Chaps Bar. Mapes told Reese that he had a pry bar and a shotgun, and that he wanted to break into the coin machines. Furthermore, Mapes said they would enter the Chaps building through a rear window. Kunz also indicated that Reese had worked with the police in another murder investigation.

Kunz also testified that John Clark, the manager of the Towne House Apartments, told him that he had overheard a conversation between appellant and Hayward Chambers in which they were discussing why Mapes had gone into a bar and killed a man.

The affidavit of Detective Kunz upon which the search warrant was issued specifically describes the location of Mapes' apartment. It contains a definite description of the items for which the police were searching:

> "A shotgun and crow-bar used in the homicide, aggravated burglary of Chaps Bar, 1-30-83, 2408 Prospect, money taken from the coin machines in said crime, and any other evidence from said crime."

It also stated that a confidential informant (Reese) was asked to be a participant in the Chaps crime by Mapes. This informant allegedly provided information to Kunz that led to the identification of a perpetrator in another murder case.

The affidavit also mentions a second confidential informant (Clark) who overheard Mapes and Chambers talking about their involvement in the murder at Chaps. The informant also allegedly provided Kunz with information that lead to the identification of the perpetrator in another homicide.

The United States Supreme Court has recently held that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *United States v. Leon* (1984), --- U.S. ---, 35 Crim. L. Rep. 3273, 3279 (U.S. July 5, 1984). Therefore, when an officer's conduct is "objectively reasonable", exclusion of evidence serves no deterrent purpose. If an officer relies on a neutral magistrate's probable cause determination, that reliance must be "objectively reasonable." In this case such reliance was clearly proper. The affidavit described with particularity where the search would be conducted, what items were being searched for and the basis for believing the items were in appellant's possession.

We also believe probable cause was established here. Under *Illinois v. Gates* (1983), ---U.S.---, 103 S.Ct. 2317, it was held that probable cause will be said to exist when there is a substantial basis for so concluding. A magistrate may consider the "totality of the circumstances" when making such a determination. See also *Massachusetts v. Upton* (1984), ---U.S.---, 104 S.Ct. 2085

Under the circumstances presented here there was a substantial basis for the issuance of the search warrant. Two reliable informants stated they heard appellant make incriminating statements. The information provided about the use of a shotgun and crowbar and the entrance by way of a back window was consistent with the manner in which the crime was committed.

Thus, the motion to suppress was properly overruled.

The twelfth assignment of error lacks merit.

"IX. THE TRIAL COURT'S SENTENCING OF THE APPELLANT IN THE ALTERNATIVE SHOULD THE DEATH SENTENCE BE MODIFIED BY A HIGHER COURT IS IN VIOLATION OF R.C. 2929.06 AND THEREFORE VOID."

The argument raised under this assignment of error is moot in view of the disposition of appellant's other arguments. Appellant complains it was error for the trial judge to enter an alternative sentence of imprisonment in the event that a higher court vacated the death penalty.

A matter is moot when a judgment is sought upon some matter which cannot have any practical legal effect upon an existing controversy. *Davies v. Columbia Gas & Electric Corp.* (Franklin 1946), 47 Ohio Law Abs. 225, 228. Because we affirm the imposition of the death penalty, any determination about an alternative sentence is rendered moot.

We also must independently weigh the aggravating circumstances against the mitigating factors to determine if the death penalty is appropriate in this case. R.C. 2929.05. We are in agreement with the determination reached by the jury and trial judge that the aggravating circumstance

outweighed any mitigating factors. Moreover, there were no mitigating factors.

The State proved beyond a reasonable doubt that the appellant had been convicted of a previous purposeful killing. R.C. 2929.04(5). Detectives Rafferty and Henion from New Jersey stated that appellant had been indicted and convicted of first degree murder of John Clark in 1972.

Defendant was the only person who testified in his behalf at the penalty phase. He made an unsworn oral statement in which he claimed he was not the triggerman in the New Jersey murder. He also stated that he had offered to plead guilty before this trial in exchange for life imprisonment without parole. Mapes stated this was "to have the jury not go through the trial."

Defense counsel argued in closing argument that the death penalty would not be a deterrent in this case because "something is wrong with him." Counsel advanced the theory that Mapes' genes caused him to commit violent crimes. Counsel was insinuating that the appellant had a deformity as a result, and society should not put those with such problems to death. This argument was totally unsupported by evidence.

We give little significance to appellant's statement that he was not the triggerman in the New Jersey incident. We find that appellant is not a credible witness due to his request to Newton to keep quiet. According to Newton, Mapes told him that because all of the people involved in that previous incident kept quiet, they only were sentenced to a short prison term. Furthermore, Mapes displayed he was not trustworthy by stating to the police he was not involved in the Chaps incident when he was originally arrested. After Newton made a statement and the shotgun shells were discovered, Mapes attempted to explain that the shells were

in the drain because the cat knocked them there. At that point, Mapes admitted for the first time that he had owned a shotgun. Thus, we place no credence in Mapes' statement.

We do not consider Mapes' request for life imprisonment a mitigating factor. There is no provision in Ohio law for life imprisonment without possibility of parole. Furthermore, many, if not most, people when faced with the possible death penalty, would choose a prison sentence. This request in no way excuses appellant's involvement in two murders.

As for counsel's argument that due to some biological quirk appellant was prone to violence, we refuse to consider such a theory which is totally unsupported by any evidence.

After independently reviewing all the evidence, we concur in the trial judge's opinion that the aggravating circumstance, that appellant previously willfully killed John Clark in New Jersey, outweighs any mitigating factors advanced by appellant.

Finally, we have reviewed similar cases to determine if the sentence imposed on Mapes is excessive or disproportionate to the penalty imposed in those other cases. *State v. Martin* (Sept. 27, 1984), Cuyahoga App. No. 47301. *State v. Spisak* (July 19, 1984), Cuyahoga App. Nos. 47458, 47459; *State v. Jenkins* (Feb. 24, 1984), Cuyahoga App. No. 45231; *State v. Shields* (Jan. 26, 1984), Cuyahoga App. No. 46012. We find the sentence imposed here is not excessive or disproportionate.

The trial court's judgment and sentence, as so modified under the tenth assignment of error, is affirmed.